

**Fighting Falsehoods:
Disappearance, Deaths, and Access to Justice in Manipur
by
Arijit Sen**

This piece of legislation is an anti-democratic measure and also a reactionary one. Instead of helping to keep the law and order position in these areas, if they declare some areas as disturbed areas, it would cause more repression, more misunderstanding and more of unnecessary persecutions in the tribal areas. This is a black law... This is also an act of provocation on the part of the Government... This is a lawless law.¹

— Laishram Achaw Singh, Member of Parliament, Manipur

Introduction

This paper focuses on the Armed Forces (Special Powers) Act 1958 (hereafter AFSPA) that was introduced as a temporary measure to control armed conflict in

Was the law justified when it was introduced back in 1958. Like was it a overkill, were the militants right?

India.² The Act has been in place for more than 55 years now. An extension of the

Armed Forces (Special Powers) Ordinance of 1942 used to control the freedom movement by the British, it was reintroduced in 1958 by the Parliament of independent India to contain the Naga insurgency in the nation's northeastern extremities. The act was later extended to Manipur in 1980 and to Jammu and Kashmir in 1990.³ In both the states, the Act, which was supposed to help the lawmakers and armed forces protect democracy, has led to a large number of

¹ Laishram Achaw Singh made the comment while debating the bill introducing Armed Forces (Special Powers) Act, August 18, 1958, Parliament, New Delhi. Quoted in Paula Banerjee, 'Communities, Gender and the Border' in Kalpana Kannabiran and Ranbir Singh (eds), *Challenging The Rule(s) of Law: Colonialism, Criminology and Human Rights in India* (Sage 2008) p266

² Amnesty International India, 'The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security' (September 2013) < <http://www.amnestyusa.org/sites/default/files/asa200422013en.pdf>> Accessed on 15 April 2015

³ Asmita Basu, 'Routinization of the Ordinary – A Mapping of Security Laws in India' Security Laws India – South Asians for Human Rights (October 2009) < <http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf>> Accessed on 6 April 2015

civilian deaths and human rights violations like enforced disappearances, torture in custody, and extrajudicial executions.⁴ The state of Punjab was also brought under the act's purview in 1983. It was later withdrawn in 1997.

This paper looks into various sections of the AFSPA, and explores its provisions that grants the Indian armed forces 'sweeping powers'⁵ – from arresting someone on mere suspicion to allowing for even 'shoot to kill'. Using the example of the state of Manipur in northeastern India, bordering Burma, my paper argues that the AFSPA creates spaces of legal exception with severe consequences to civilian life. In doing so, it brings into relief how in India the AFSPA, putatively instituted to protect democracy, in fact acts as a deterrent to access to justice for those affected by State terror. Further, it shows how individuals or groups opposed to the State's narrative of governance and development are systematically victimised, tortured, brutalised in violation of their basic rights by the armed forces. Lastly, the paper traces the legal recourse to justice, and demonstrates how laws meant to protect the affected are, in fact, used to shield the armed forces. In the process, it also comments on the precarity of activists pushing for civil liberties in the region, who are invariably marked anti-state and often end up as victims of forced-disappearances and torture.

⁴ Amnesty International India, 'The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security' (September 2013) < <http://www.amnestyusa.org/sites/default/files/asa200422013en.pdf> > Accessed on 15 April 2015

⁵ *Ibid.*

The AFSPA in Manipur

In March 2015, the Indian Government decided to reject in entirety the suggestions of a report produced ten years prior by the Justice Jeevan Reddy Committee. It had asked the government to repeal the AFSPA.⁶ The Reddy Committee had been constituted after the alleged rape and murder of a 32-year-old woman Thangjam Manorama Devi by Indian paramilitary forces in 2004. Manorama was arrested in the middle of the night by armed forces from her residence on suspicion of being an active cadre of a banned militant outfit in Manipur.⁷ She was picked up according to Section 4 of AFSPA (explained later). Section 5 of the Act stipulates that the arrestee be handed over to the nearest police station. In a flagrant disregard of the law, this was never done.⁸ Next morning, Manorama was found dead in an open field with bullet wounds all over her body including on her genitalia. As claimed by Haksar, '[Manorama] was shot in the vagina to hide the evidence of the crime'.⁹ As a mark of protest against the State, two days after her murder, twelve women disrobed in front of the Indian paramilitary headquarters in Imphal, the capital city of Manipur. Naked, together they stretched a single length of white cloth that had 'Indian army

⁶ Aman Sharma, 'Suggestion to scrap Armed Forces (Special Powers) Act rejected by Home Ministry' *Economic Times* (28 February 2014) < http://articles.economictimes.indiatimes.com/2015-02-28/news/59612789_1_afspa-justice-jeevan-reddy-committee-armed-forces > accessed 2 April, 2015

⁷ Human Rights Watch, 'These Fellows Must Be Eliminated': Relentless Violence and Impunity in Manipur' (September 2008), pp. 25-30

⁸ Nandita Haksar and Sebastian Hongray, *The Judgement That Never Came: Army Rule In North East India* (First edition, Chicken Neck, 2011) p.315

⁹ *Ibid.*

rape us' and 'Indian army take our flesh' written on it in red paint.¹⁰ The protest, organised by the Meira Paibis, a prominent women's group in Manipur¹¹ and the Apunba Lup, a conglomerate of civil society organisations, brought this murder and the AFSPA under spotlight. At this point, on instructions from India's Prime Minister, Justice Jeevan Reddy was asked to head a five-member committee to review the AFSPA. Despite the committee's suggestions to repeal the act, it remains in force even now.

Resistance in Manipur

Manipur, an independent kingdom came under British rule in 1891. In 1949, Manipur signed a treaty of accession and became part of India. In the run up to this accession, the king of Manipur had been summoned by the Indian Home Minister, and was 'warned in no uncertain terms'¹² not to think of any other alternative, thereby raising suspicions of having been coerced into signing the treaty.¹³ The opposition to integration with India came from ordinary Manipuris and not the monarchy. It was in 1964, fifteen years after this event, that Manipur started

¹⁰ Revati Laul, 'We Stripped And Shouted, 'Indian Army, Rape Me!' It Was The Right Thing To Do', *Tehelka* (23 February 2013), <<http://www.tehelka.com/we-stripped-and-shouted-indian-army-rape-me-it-was-the-right-thing-to-do/>> accessed on 2 April, 2015

¹¹ Human Rights Watch, 'These Fellows Must Be Eliminated': Relentless Violence and Impunity in Manipur' (2008), p 4

¹² Bertil Lintner, *Great Game East: China, India and the Struggle for Asia's Most Volatile Frontier*, p

¹³ South Asia Human Rights Documentation Centre, 'Armed Forces Special Powers Act: A Study in National Security Tyranny' <http://www.hrdc.net/sahrdc/resources/armed_forces.htm>

witnessing violent anti-India resistance that began with the formation of the United National Liberation Front (UNLF).¹⁴

As different resistance groups emerged and violence sustained itself¹⁵, Manipur was declared a disturbed area. In 1980, the AFSPA was clamped down on the state.¹⁶ The Act still remains in place. Despite an elected government and an electoral process that witnesses a voter turnout of 79 per cent¹⁷, human security remains fragile in Manipur. There are 'a number of militias today [that] regard [Manipur's] merger as illegal and unconstitutional'.¹⁸ The constant presence of AFSPA has led to a 'de facto militarisation of Manipur and other north-eastern states of India'.¹⁹ In 2006, after a visit to Manipur, Henry V Jardine, US Consulate General, Calcutta mentioned in a secret cable to Washington DC that 'the general use of AFSPA meant that the Manipuris did not have the same rights of other Indian

¹⁴ Bertil Lintner, *Great Game East: China, India and the Struggle for Asia's Most Volatile Frontier* (First edition, Harper Collins 2012), pp. 135-182

¹⁵ Shruti Mukherji, 'Meira Paibis: Women Torch-Bearers On March In Manipur' (31 December 2010) <<http://www.mainstreamweekly.net/article2533.html>> Accessed on 10 April 2015

¹⁶ Ningthouja Malem, *Freedom From India: A History of Manipur Nationalism (1947-2000)* (First Edition Spectrum Publications 2011), p.360

¹⁷ Election Commission of India, 'Voter Turnout Highlights of Lok Sabha Election 2014', <http://eci.nic.in/eci_main1/SVEEP/VoterTurnoutHighlightsLokSabha2014.pdf> A

¹⁸ Sanjib Baruah, *Durable Disorder: Understanding the Politics of Northeast India* (first edition, Oxford University Press, 2005) p. 60

¹⁹ REDRESS, Asian Human Rights Commission and Human Rights Alert, 'The Armed Forces (Special Powers) Act in Manipur and other States of the Northeast of India' (18 August 2011) <http://www.redress.org/downloads/AFSPA_final_180811.pdf> p.6

citizens and restrictions on travel to the state added to a sense of isolation and separation from rest of India 'proper'.²⁰

The Armed Forces (Special Powers) Act (AFSPA) and Its Provisions

The AFSPA empowers the 'Governor of a State or the administrator of a Union Territory or a Central Government'²¹ to declare an area as disturbed if they think that 'the whole or any part of such State or Union territory, as the case may be, is in such a disturbed or dangerous condition'²² that armed forces should come in the aid of the civil administration. A 1972-amendment of the Act includes the Air Force as part of the armed forces leading to the provision of using Indian Air Force against civilians, the precedence for which had been set in the Indian state of Mizoram in 1966.²³

Section 3 of the Act that talks about the power to declare areas as disturbed

'has been kept deliberately vague'.²⁴ This section gives the State and thus the armed

²⁰ The India Cables, '76968: Manipur experiences escalating violence', *The Hindu* (21 March 2011) < <http://www.thehindu.com/news/the-india-cables/the-cables/article1556742.ece> > Accessed on 6 April 2015

²¹ Armed Forces (Special Powers) Act, 1958, Act 28 of 1958, (11 September, 1958) < [https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/23fb81e4ad23e2b3c1257682002cfd/\\$FILE/The%20Armed%20Forces%20%28Special%20Powers%29%20Act.pdf](https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/23fb81e4ad23e2b3c1257682002cfd/$FILE/The%20Armed%20Forces%20%28Special%20Powers%29%20Act.pdf) >

²² *Ibid.*

²³ South Asia Human Rights Documentation Centre, 'Armed Forces Special Powers Act: A Study in National Security Tyranny' <http://www.hrdc.net/sahrdc/resources/armed_forces.htm> Accessed on 6 April 2015

²⁴ Asmita Basu, 'Routinization of the Ordinary – A Mapping of Security Laws in India' *Security Laws India – South Asians for Human Rights* (October 2009) < <http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf> > Accessed on 6 April 2015

forces, 'extraordinary and unaccountable powers'.²⁵ In areas where the AFSPA has been imposed there is a '[common] experience of human rights abuses'.²⁶ So, like most counter-terror laws in India, the AFSPA 'is characterised by emphasis on protection of the state rather than the people'.²⁷ It thus fails in its main purpose, and as Manoharan argues, it alienates people 'who are less likely to cooperate with law enforcement ...[a] trend evident in Jammu and Kashmir and the northeast of India'.²⁸

The absence of accountability gets reflected in **Section 4 of the AFSPA** that allows 'any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces' to arrest, detain, shoot to kill, anyone without any warrant and just on mere suspicion. In effect it legitimises the use of any kind of force if and when necessary.²⁹ Noted lawyer Noorani mentions, 'Section 4(a) of the Act is a *statutory obscenity* (emphasis added). It occurs in no statute anywhere in any democracy. It has been aptly called a 'license to kill'.'

²⁵ Ujwal Kumar Singh, 'Penal Strategies and Political Resistance in Colonial and Independent India' in Kalpana Kannabiran and Ranbir Singh (eds) *Challenging The Rule(s) of Law, Colonialism, Criminology and Human Rights in India*, (Sage 2008) p. 247

²⁶ Human Rights Watch, 'Getting Away With Murder: 50 years of the Armed Forces Special Powers Act, (August 2008) < <http://www.hrw.org/legacy/backgrounder/2008/india0808/india0808webwcover.pdf>>, p. 7

²⁷ N Manoharan, 'Trojan Horses? Efficacy of Counter-terrorism Legislation in a Democracy Lessons from India', Centre for Land Warfare Studies, New Delhi, Manekshaw Paper No 30. 2011. p. 15

²⁸ *Ibid.*

²⁹ Armed Forces (Special Powers) Act, 1958, Act 28 of 1958, (11 September, 1958) < [https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/23fb81e4ad23e2b3c1257682002cfdcf/\\$FILE/The%20Armed%20Forces%20%28Special%20Powers%29%20Act.pdf](https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/23fb81e4ad23e2b3c1257682002cfdcf/$FILE/The%20Armed%20Forces%20%28Special%20Powers%29%20Act.pdf)>

Examples of violations abound ³⁰ in areas where the AFSPA has been imposed and the act goes a step further to provide impunity to the armed forces. Thus **Section 6 of the Act** termed, 'Protection to persons acting under the Act' underlines that 'no prosecution, suit or other legal proceeding' can be carried out against them without a nod from the Central Government. This provision of the Act is a definite barrier to access to justice and provides 'de jure impunity to the Indian armed force' because it makes it almost impossible to initiate any criminal proceedings against them through a civilian court, or without permission of the central government.³¹

The Manorama Devi Case

In the last 57 years since the AFSPA was introduced, not once has the Indian government given permission to try the armed forces for crimes committed under the act. ³² The Manorama Devi case is an example of how Section 6 of the AFSPA protects the forces and also acts as a deterrent to access to justice. The report to the Manorama Death Inquiry Commission, a copy of which was handed over to India's Supreme Court as late as 2014, mentions that Manorama was 'mercilessly tortured'.

³⁰ Anjuma Ara Begum, 'AFSPA and unsolved massacres in Manipur' (3 November 2010) <http://twocircles.net/2010nov03/afspa_and_unsolved_massacres_manipur.html#.VR6BU9zF_HQ> Accessed on 6 April 2015

³¹ Human Rights Watch, 'Getting Away With Murder: 50 years of the Armed Forces Special Powers Act, (August 2008) <<http://www.hrw.org/legacy/background/2008/india0808/india0808webwcover.pdf>>, pp. 16-17

³² Asmita Basu, 'Routinization of the Ordinary – A Mapping of Security Laws in India' Security Laws India – South Asians for Human Rights (October 2009) <<http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf>> Accessed on 6 April 2015

The report adds that the defence put up by the armed forces in Court that she was shot when she tried to escape was 'a naked lie'.³³ It also shows how, the armed forces used AFSPA for their defence to escape conviction:

[Different] functionaries of the Police Department moved applications for allowing to examine the Assam Rifles Personnel as they were not easily available. But, one is unhappy to note that the 17th Assam Rifles on flimsy and unsustainable grounds, stating amongst others that till completion of the Army's Court of Inquiry, the Civil Police could not be permitted to examine the personnel of the 17th Assam Rifles.³⁴

More than ten years later, not one army personnel involved in the alleged rape and murder have been convicted.

In fact, this impunity appears institutionalised. Manorama's death in 2004³⁵ before which her arrest was made was in total disregard of procedures laid out by the Supreme Court as mentioned in *Naga People's Movement for Human Rights (NPMHR) v Union of India* (AIR, 1998).³⁶ The Upendra Commission Report thus mentions:

While conducting the search and arrest of Km. Manorama if the Assam Rifles had followed the Do's and Don't's as laid down by the Hon'ble Supreme Court and if any woman police accompanied the Assam Rifles party in taking her after arrest to different places, unfortunate incident might not have happened and there might have been witnesses other than the Assam Rifles personnel to what the personnel of Assam Rifles did on the arrested lady and will be able to ascertain whether the version of the Assam Rifles that she was shot dead while trying to escape is correct or not and if torture of any kind was made or not'.³⁷

³³ Krishnadas Rajagopal, 'Manorama mercilessly tortured' *The Hindu* (14 November 2014) < <http://www.thehindu.com/news/national/manorama-death-brutal-torture-probe-panel/article6596278.ece>> Accessed on 6 April 2015

³⁴ C Upendra Singh Retired District and Sessions Judge, Manipur, 'Report Of The Commission Of The Judicial Inquiry (Manorama Death Inquiry Commission)' p. 129

³⁵ Nandita Haksar and Sebastian Hongray, *The Judgement That Never Came: Army Rule In North East India* (First Edition Chicken Neck 2011), p315

³⁶ *Naga People's Movement of Human Rights v Union of India* 1998(2) SCC 109

³⁷ C Upendra Singh Retired District and Sessions Judge, Manipur, 'Report Of The Commission Of The Judicial Inquiry (Manorama Death Inquiry Commission)' p. 145

Though the court lays down instructions that the armed forces should follow, the reality remains divorced from such rules.³⁸ The Malom massacre of November 2000, in which the army killed ten civilians waiting at a bus stop as retaliation to an attack by insurgents,³⁹ or Operation Bluebird, a counter-insurgency operation carried out by the Indian Army in 1987, are just some examples of human rights violations and impunity that have sustained themselves leading to erosion of civil liberties.⁴⁰

As recent as September 2013, a panel appointed by India's Supreme Court found some Indian army officers in Manipur to have staged a murder and passed it off as an encounter.⁴¹ One of the army officers in question was awarded India's highest peacetime gallantry medal. The Supreme Court panel – in response to a public interest litigation in Manipur – investigating extra-judicial deaths of 1,500 people, in the first instance, found six encounters to be faked and carried out 'with

³⁸ KG Kannabiran, *The Wages of Impunity: Power, Justice and Human Rights* (First Edition, Orient Longman, 2004) pp. 75-76

³⁹ Ninglun Hanghal, '13 years later, 'Iron Lady' Sharmila refuses to give up', *India Today* (2 November 2014) <http://indiatoday.intoday.in/story/13-years-later-iron-lady-sharmila-refuses-to-give-up/1/398778.html> Accessed on 6 April 2015

⁴⁰ Hueiyen Lanpao, '25th Commemoration of 'Onae Reh Dah (Operation Blue Bird)(28 June 2012) < <http://www.hueiyenlanpao.com/articles/item/2622-25th-commemoration-of-onae-reh-dah-operation-blue-bird>> Accessed on 7 April 2015

⁴¹ Utkarsh Anand and Esha Roy, 'Ashoka Chakra awardee led fake encounter in Manipur, say SC panel', *The Indian Express* (15 September 2013), < <http://archive.indianexpress.com/news/ashoka-chakra-awardee-led-fake-encounter-in-manipur-says-sc-panel/1169378/>> Accessed on 7 April 2015

impunity'.⁴² It found the maximum use of force in each of these cases. As mentioned in Amnesty International's review of the AFSPA⁴³, in some cases '89 bullets were fired by security forces, and in one case, the victim suffered from 16 wounds from bullets shot at close range. In all the cases, no army or police personnel, or their vehicles, were hit or injured by bullets allegedly fired by victims'. When the choice exists for a crime to be tried under a criminal court or a military court, impunity is further extended by The Indian Army Act. It also extends a barrier against access to justice. Section 125 of the said Act provides:

when a criminal court and a court martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody.⁴⁴

Col Indra Sen Singh's argument mentioned in Human Rights Watch 2008 report,⁴⁵ deftly captures the framework that strengthens the immunity that the AFSPA

⁴² J Venkatesan, 'Panel identifies 6 fake encounter killings in Manipur' *The Hindu* (4 April 2013) <<http://www.thehindu.com/news/national/other-states/panel-identifies-6-fake-encounter-killings-in-manipur/article4580333.ece>> Accessed on 7 April 2015

⁴³ Amnesty International India, 'The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security' (September 2013) <<http://www.amnestyusa.org/sites/default/files/asa200422013en.pdf>> Accessed on 15 April 2015
And Human Rights Lawyers Network, 'Report of the Supreme Court Appointed Commission', <<http://www.hrln.org/hrln/images/stories/pdf/hedge-report-manipur.pdf>> Accessed on 15 April 2015

⁴⁴ Indian Army Act, 'Section 125 in The Army Act, 1950' <<http://indiankanoon.org/doc/440590/>>

⁴⁵ Human Rights Watch, 'Getting Away With Murder: 50 years of the Armed Forces Special Powers Act, (August 2008) <<http://www.hrw.org/legacy/backgrounder/2008/india0808/india0808webwcover.pdf>>

provides to armed forces. Col Singh argues, '[the high courts] have generally adopted a 'hands off' attitude towards the [sic] military matters',⁴⁶

Right to Life and Right to Liberty

The above outline points out how an act like the AFSPA not only institutionalises impunity and acts as a barrier to justice for Indian civilians living under its writ; it also violates the fundamental Right to Life and Right to Liberty as enshrined in Article 21 of the Indian Constitution. Article 21 states that 'no person shall be deprived of his life or personal liberty except according to a procedure established by law'.⁴⁷ There are several interpretations of right to life and liberty. It can be even be extended to include 'protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights'.⁴⁸ The imposition of AFSPA violates these rights also with regard to Article 20 of the Indian Constitution that allows right to a fair trial.

The AFSPA can be imposed only when there is a state of emergency.

However, Article 359 of the Indian Constitution states that Article 20 and Article 21 have to continue even during a state of emergency. Thus right to a fair trial and right

⁴⁶ Col. Indra Sen Singh, 'Military Justice System: Re-enforcing the Confidence,' in Maj Gen Nilendra Kumar AVSM (eds) *Military Law: Then, Now and Beyond*, (Judge Advocate General's Department 2005) p. 231.

⁴⁷ Article 21 of Constitution of India, [www.scribd.com](http://www.scribd.com/doc/52481658/Article-21-of-the-Constitution-of-India#scribd)
<<http://www.scribd.com/doc/52481658/Article-21-of-the-Constitution-of-India#scribd>>

⁴⁸ Francis Corallie Mullin vs The Administartor, Union Territory of Delhi & Ors, 1981 AIR 746, 1981 SCR (2) 516 <http://indiankanoon.org/doc/78536/> and Sunil Batra vs Delhi Administration, 1980 AIR 1579, 1980 SCR(2) 557 <http://indiankanoon.org/doc/778810/>

to life, can never be suspended even with the imposition of AFSPA. Both rights are guaranteed and protected by the constitution.⁴⁹ Correctly pointed out by Basu, these articles 'are critical safeguards against State Action'.

The Legal Challenge to AFSPA

Despite these safeguards, the right to life as mentioned in Article 21 has been violated without an iota of regard for legal ramifications under the AFSPA. This is what Basu calls, 'Routinization of the extraordinary'. The most prominent challenge to the AFSPA came from a group of brave lawyers representing the Naga People's Movement for Human Rights (NPMHR). In 1987, in a counterinsurgency operation named 'Operation Bluebird', the Indian Army attacked civilians as a measure of retaliation. It began on 11 July 1987 and lasted a full four months, until the end of October.⁵⁰ In that attack,

'thirty villages were affected, 125 residents houses allegedly burnt, 112 houses, 6 schools and 10 churches were dismantled, properties worth of Rs. 50,75,000/- were looted from seven villages and villagers belonging to five villages were forced to work, 27 persons were allegedly killed in the encounter on different dates in Senapati District of Manipur, 3 women were allegedly raped and five women were allegedly sexually molested and 300 persons were allegedly tortured by Assam Rifles as enumerated by the Naga People's Movement for Human Rights'.⁵¹

⁴⁹ Asmita Basu, 'Routinization of the Ordinary – A Mapping of Security Laws in India' Security Laws India – South Asians for Human Rights (October 2009) < <http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf>> Accessed on 6 April 2015

⁵⁰ Paula Banerjee, 'Communities, Gender and the Border' in Kalpana Kannabiran and Ranbir Singh (eds), *Challenging The Rule(s) of Law: Colonialism, Criminology and Human Rights in India* (Sage 2008) p279

⁵¹ 25th Commemoration of 'Onae Reh Dah (Operation Blue Bird) (10 July 2012) <http://e-pao.net/epSubPageExtractor.asp?src=news_section.opinions.Opinion_on_Killings_in_Manipur.25th_Commemoration_of_Onae_Reh_Dah_Operation_Blue_Bird> Accessed on 3 April 2015

Amnesty International came out with a 73-page report that noted down the human rights violations and the torture: 'polythene blocked nose and mouth completely causing unconsciousness out of breathless hours; the deponent was made to sit on a chair ... The zip of the trousers of the deponent was opened and two naked wires were inserted on lower parts of the abdomen'.⁵² There were reports 'of women being raped in front of villagers and even pregnant women were not spared'.⁵³

The NPMHR moved several writ petitions between 1980 and 1991. They challenged the AFSPA and the competence of Parliament,⁵⁴ saying that since it was a law that could only be used in times of emergency, it was imperative on the part of the Indian government to declare a state of emergency in northeast India where there was an 'armed rebellion'. If not, then the AFSPA is unconstitutional, the NPMHR maintained. Article 352 of the Indian Constitution allows the state to declare a situation of emergency in case of an armed rebellion.⁵⁵ The NPMHR also moved a case against the Governor. The Supreme Court in its judgment defended the state's right to impose the AFSPA by saying that the situation in Northeast India was not equivalent to an armed rebellion equivalent of disrupting the rest of India.

⁵² Amnesty International USA, 'India: "Operation Bluebird" : A Case Study of Torture and Extrajudicial Executions in Manipur' 1990, pp 17-23

⁵³ Paula Banerjee, 'Communities, Gender and the Border' in Kalpana Kannabiran and Ranbir Singh (eds), *Challenging The Rule(s) of Law: Colonialism, Criminology and Human Rights in India* (Sage 2008) p. 270

⁵⁴ KG Kannabiran, *The Wages of Impunity: Power, Justice and Human Rights* (First Edition, Orient Longman, 2004) pp. 75-76

⁵⁵ Asmita Basu, 'Routinization of the Ordinary – A Mapping of Security Laws in India' Security Laws India – South Asians for Human Rights (October 2009) < <http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf>> Accessed on 10 April 2015

So there was no need to declare emergency. Thus the Supreme Court decision neutralised the challenge and upheld the constitutional validity of the AFSPA. The court also used Article 361 of the Constitution that gave the Governor immunity.

Noorani in a scathing analysis of the AFSPA and the Supreme Court's judgment in the NPMHR case thus says, 'Read the entire report of the case, from pages 109 to 158 from the head-notes onwards, and you will not find even a mention, let alone a discussion of Article 21, the one constitutional provision which alone suffices to invalidate the Act'.⁵⁶ After Oinam, several similar incidents followed that killed, disappeared and raped Indian citizens in Manipur. With legal immunity for the armed forces, citizens were left standing on their own, fighting the apparitions of democracy. The rape and murder of Manorama took place almost two decades after Oinam massacre. In 2005, Justice Reddy in his review of the AFSPA mentioned, 'It is true that the Hon'ble Supreme Court has upheld its constitutional validity, but that circumstance is not an endorsement of the desirability or advisability of the Act'.

Preventive Detention, the AFSPA and Enforced Disappearances

The AFSPA also brings into focus the practice of preventive detention and Article 22 of the Indian Constitution. Section 1 of Article 22 states: 'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the right to consult, and to be defended

⁵⁶ Armed Forces (Special Powers) Act: Urgency of Review, Economic and Political Weekly, p8, August 22, 2009, Vol XLIV No 34

by, a legal practitioner of his choice'. Thus it guarantees a person's right to legal aid and access to justice if and when arrested. Underlining this right, in a judgment, India's Supreme Court has also said that it is the duty of the magistrate or the judicial authority to inform the person arrested of his or her right to be defended by a lawyer.⁵⁷

Section 2 of Article 22 is as important because it protects a person from arbitrary detention. It states:

Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

However, such protections disappear in the case of preventive detention. Preventive detention laws 'authorize administrative detention to prevent *apprehended* breaches of state security'.⁵⁸ For the State, such detention becomes more relevant in a place like Manipur where at least 30 rebel groups (as listed by India's Home Ministry) and human rights activists belonging to the region are constantly, politically or otherwise, challenging the narrative of the State. As argued by K G Kannabiran, 'Ever since the constitution came into force, political dissent in India has been managed with the help of preventive detention laws. Seen as the most efficient way of containing politics of dissent by physically barring free speech and movement, the

⁵⁷ Khatri V State of Bihar 1981 SCR(2) 408

⁵⁸ Asmita Basu, 'Routinization of the Ordinary – A Mapping of Security Laws in India' Security Laws India – South Asians for Human Rights (October 2009) < <http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf> > Accessed on 10 April 2015

use of preventive detention has been validated by the court for decades'.⁵⁹ Article 22 permits preventive detention.

The AFSPA is not a preventive detention law. Hence, the two sections of Article 22 that talk about legal aid and time of detention are most crucial to those arrested under the act. However, there are several instances where these rights have been compromised and state action under the AFSPA translates into preventive detention. That leads to further concerns that include fear about the ill-treatment of those arrested and misapplication of the law in the name of democracy.

Section 5 of AFSPA says, 'Any person arrested and taken into custody under this Act shall be made over to the officer-in-charge of the nearest police station *with the least possible delay* (emphasis added), together with a report of the circumstances occasioning the arrest'. The lack of encoded exactness regarding the lapse of time post-arrest is commonly misused by the authorities, and often leads to enforced disappearances. It violates the arrestee's access to legal aid and justice, and there are several examples of such cases.

On 10 January 1981, the husband of Nungshitombi Devi was arrested by armed forces under Section 4(c) of the AFSPA. There was no news of him till February 22, 1981. In *Nungshitombi Devi v Reishang Keishing, Chief Minister, Manipur*, the court found no justification for this delay, Section 5 of AFSPA notwithstanding.⁶⁰

⁵⁹ K G Kannabiran, 'Conspiracies of Association: Associational Offences, Associational Freedoms and the Rule of Law' in Kalpana Kannabiran and Ranbir Singh (eds) *Challenging The Rule(s) of Law* (Sage, 2008) p. 401

⁶⁰ Armed Forces (Special Powers) Act, 1958, Act 28 of 1958, (11 September, 1958) <
<https://www.icrc.org/applic/ihl/ihl->

In Manipur, as documented by the Extrajudicial Execution Victims' Family Members, 1,528 civilians including 98 children have been killed by security forces between 1979 and 2012.⁶¹ The Manipur Women Gun Survivor's Network insists that over 20,000 people have killed in the last five decades.⁶² Away from Manipur in Kashmir, one of the most heavily militarized zones in the world, between 1989 and 2006 at least 8,000 people have disappeared.⁶³ That number is four times the number of enforced disappearances in Pinochet's Chile.⁶⁴

Violation of International Obligations

The violations that take place under the AFSPA run counter to India's obligations to several international human rights treaties. The various sections of AFSPA violate several fundamental rights and international obligations. As mentioned in a 2008 *Human Rights Watch* report, **The Right to Life** is violated by Section 4(a) of the AFSPA that allows armed forces to shoot to kill; Section 6 of the AFSPA violates **the Right to Effective Remedy** that protects officers by giving them immunity from legal proceedings for their actions; and **the Right to Liberty and Security of a**

[nat.nsf/0/23fb81e4ad23e2b3c1257682002cfd/\\$FILE/The%20Armed%20Forces%20%28Special%20Powers%29%20Act.pdf](http://nat.nsf/0/23fb81e4ad23e2b3c1257682002cfd/$FILE/The%20Armed%20Forces%20%28Special%20Powers%29%20Act.pdf)>

⁶¹ Arijit Sen, 'There Are At Least 500 Child Soldiers Fighting in Northeast India, and the World Hasn't Noticed' *Time* (24 March 2014) < <http://time.com/33008/child-soldiers-recruited-into-northeast-india-insurgencies/> > accessed on 2 April 2015

⁶² Manipur Women Gun Survivor's Network <http://nobelwomensinitiative.org/wp-content/uploads/2011/11/Manipur_Women_Gun_Survivors-6.pdf>

⁶³ Association of Parents of Disappeared Persons < <http://www.disappearancesinkashmir.org/about.html> >

⁶⁴ Ibid.

Person is respectively violated by Section 4(c) that allows arrest on mere suspicion and by Section 5 that says those arrested be handed over with least possible delay.⁶⁵ A look at different cases also gives an impression that the AFSPA violates the **Right to be free from torture, cruel or degrading treatment**.⁶⁶ There are several areas of incompatibility between AFSPA and India's obligation with the International Covenant on Civil and Political Rights (ICCPR).

Article 6 of ICCPR about the Right to Life states: *Every human being has the inherent right to life. No one shall be arbitrarily deprived from his [or her] right to life.*⁶⁷ The AFSPA violates this basic right by authorising the use of lethal force.⁶⁸ The AFSPA also violates **Article 7 of ICCPR** that states: *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*'. But as mentioned in an analysis of the AFSPA by REDRESS, 'AFSPA grants military officers broad power to detain individual without providing any safeguard against arbitrary detention, contrary to the State's obligation to adopt legislative measures aimed at preventing torture'.⁶⁹

⁶⁵ Human Rights Watch, 'Getting Away With Murder: 50 years of the Armed Forces Special Powers Act, (August 2008) <<http://www.hrw.org/legacy/backgrounder/2008/india0808/india0808webwcover.pdf>> pp. 6-7

⁶⁶ Amnesty International USA, 'India: "Operation Bluebird" : A Case Study of Torture and Extrajudicial Executions in Manipur' 1990, pp 17-23

⁶⁷ REDRESS, Asian Human Rights Commission and Human Rights Alert, 'The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India's human rights obligations' (August 2011) <http://www.redress.org/downloads/AFSPA_final_180811.pdf> pp.17-18

⁶⁸ Ibid

⁶⁹ REDRESS, Asian Human Rights Commission and Human Rights Alert, 'The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India's human rights obligations' (August 2011) <http://www.redress.org/downloads/AFSPA_final_180811.pdf> p. 21

Torture of individuals arrested under AFSPA in Manipur on a regular basis are examples of such violations.⁷⁰ **Article 3 of ICCPR states** *The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.*⁷¹ Thus as Basu notes, 'it recognises the right to an effective remedy in case of violation of any of the ICCPR rights'.⁷²

Derogation of Rights under ICCPR

However, **Article 4 of ICCPR** allows states to derogate from these rights in '*times of public emergencies which threatens the life of the nation and the existence of which is officially proclaimed*'. But there are certain rights, which are non-derogable.⁷³ These non-derogable rights include, the Right to Life (Article 6), Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7), and right not to be held in slavery (Article 8). India has not derogated from any of the ICCPR provisions and this in effect implies that all the ICCPR articles should be

⁷⁰ Amnesty International USA, 'India: "Operation Bluebird" : A Case Study of Torture and Extrajudicial Executions in Manipur' 1990, pp 17-23

⁷¹ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49
<<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> >

⁷² Asmita Basu, 'Routinization of the Ordinary – A Mapping of Security Laws in India' Security Laws India – South Asians for Human Rights (October 2009) < <http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf> > Accessed on 10 April 2015

⁷³ Ibid

valid in Manipur.⁷⁴ But unfortunately, the AFSPA has been implemented in Manipur in a manner that it remains in violation of Article 6, Article 7, Article 8 of ICCPR and thus against India's international obligations.

AFSPA's violations and the legal cover extended to those violations by the armed forces remain unheard of any other democracy. Even during the conflict in 'Northern Ireland which faced an armed revolt and terrorist attacks from 1968 until the Belfast Agreement in 1997'⁷⁵ no protection was extended to the armed forces.

The Human Rights Committee, 'an independent body comprising mostly of human rights lawyers'⁷⁶ has underlined that right to life is a 'supreme right' and 'it is basic to all human rights'.⁷⁷ Right to life 'is not absolute in so far as international treaties such as the ICCPR, ACHR and ACHPR permit the use of lethal force that is

⁷⁴ REDRESS, Asian Human Rights Commission and Human Rights Alert, 'The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India's human rights obligations' (August 2011) <http://www.redress.org/downloads/AFSPA_final_180811.pdf> p. 30

And, Asmita Basu, 'Routinization of the Ordinary – A Mapping of Security Laws in India' Security Laws India – South Asians for Human Rights (October 2009) <<http://www.southasianrights.org/wp-content/uploads/2009/10/IND-Security-Laws-Report.pdf>> Accessed on 10 April 2015

⁷⁵ AG Noorani, 'AFSPA: License To Kill' 17, *Frontline* (April 2015) <<http://www.frontline.in/the-nation/afspa-licence-to-kill/article7048801.ece>> Accessed 18 April, 2015

⁷⁶ REDRESS, Asian Human Rights Commission and Human Rights Alert, 'The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India's human rights obligations' (August 2011) <http://www.redress.org/downloads/AFSPA_final_180811.pdf> p. 17

⁷⁷ Human Rights Committee, General Comment No. 14: Right to Life, UN Doc. HRI/GEN/1/Rev.9, Vol. I (9 November 1984), at para. 1.

not 'arbitrary'.⁷⁸ AFSPA (Section 4) that allows armed forces to shoot to kill even at suspicion violates all international laws. It makes citizens vulnerable to extrajudicial killings. Thus '[traditionally], the right to life [that] has been understood as a civil right that protects against extrajudicial killings and other unjustifiable use of lethal force'⁷⁹ is violated by AFSPA. Evidence gathered from various incidents in Manipur often point to 'indiscriminate use of firearms', 'cold-blooded execution rather than firing at a suspicious target' and 'without any reasonable ground'.⁸⁰

Repeal the Act

In India, legal committees appointed by the government have consistently opposed the imposition of AFSPA. The Veerappa Moily Administrative Reforms Commission (2007)⁸¹ wanted the Act to be repealed in line with the suggestions of Justice Jeevan Reddy Committee (2005). Justice Reddy wanted AFSPA to go but with certain provisions of the Act incorporated in other legislations.⁸² The Justice Verma

⁷⁸ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (First Edition Cambridge University Press, 2013) p.316

⁷⁹ Ibid p.325

⁸⁰ REDRESS, Asian Human Rights Commission and Human Rights Alert, 'The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India's human rights obligations' (August 2011)
<http://www.redress.org/downloads/AFSPA_final_180811.pdf> pp. 6-8.

⁸¹ Government Of India, 'Fifth Report: Second Administrative Reforms Commission: Public Order', (June 2007) < <http://arc.gov.in/5th%20REPORT.pdf>> pp. 238-239,

⁸² Amnesty International, 'The Armed Forces Special Powers Act (AFSPA) Review Committee takes one step forward and two backwards' (November 2006)
<<http://www.refworld.org/pdfid/45a234212.pdf>>

Committee (2013)⁸³ talked about the removal of protection extended to armed forces in Section 6 of the Act and the imminent need to bring sexual offences by armed forces under ordinary criminal law.⁸⁴ International observers hold similar views and have called for direct repeal of the act. The report to the UN Human Rights Council (2012) by Special Rapporteur on extrajudicial, summary or arbitrary executions, Cristof Heyns or the report of Rashida Manjoo, UN Special Rapporteur on violence against women, its causes and consequences (2011), or that of Margaret Sekaggya, UN Special Rapporteur on the situation of human rights defenders (2011), oppose AFSPA and have called for its repeal. From 1997, a total of 14 UN Special Rapporteurs have held similar views regarding the Act.⁸⁵

Low intensity conflict

What does Constitution say on international law obligations

Lynn's Tunisia article

Universal Declaration of Human Rights

⁸³ Justice Verma, 'Report Of The Committee On Amendments To Criminal Law' (23 January 2013) <http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf> p

⁸⁴ *Ibid.*

⁸⁵ NEDF calls for repeal of AFSPA <<http://www.arunachaltimes.in/wordpress/2012/12/22/nedf-calls-for-repeal-of-afspa/>>

Observation

<https://exposingafspa.wordpress.com/tag/legal-analysis-of-afspa/>

Examples

22....aaa⁸⁶ (page 98/109/114)

See Usha Ramanathan, Extraordinary Laws and Human Rights Insecurities, ASIARIGHTS J., July 2004,

<http://rspas.anu.edu.au/asiarightsjournal/Ramanathan.pdf>; Derek P. Jinks, The Anatomy of an

Institutionalized Emergency: Preventive Detention and Personal Liberty in India, 22 MICH. J. INT'L L.

311 (2001).

Derogation

Emergency

NPMHR case

The Case of Irom Sharmila

False Democracy and just a few thousand dead

⁸⁶ Colonial Continuities: Human Rights, Terrorism, And Security Laws In India<
http://www.nycbar.org/pdf/ABCNY_India_Report.pdf> Columbia Journal of Asian Law

essay hoping one day AFSPA will be repealed and my friends in Manipur, will live free and happy.

Why did Irom Sharmila who protested against AFSPA and fasted for more than 15 years only get 90 vo